SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. 767

LOUIS SANDERS, et al.,

Petitioners,

vs.

JOHN ERRECA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Citation to Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement	4
Reasons for Granting Certiorari	9
1. The Decision Below Results In Conflict With Decisions of Other Circuits.	9
2. The Decision Below Creates Doubt As To What Constitutes a Deprivation Of a Constitutionally Protected Right.	10
3. The Decision Below Creates Conflict With Federal Cases In Other Circuits Taking a Liberal View of Economic Rights Within Constitutional Protection.	14
Conclusion	19

Page

Appendices:

A. Statutes Involved 21

B. Opinion of the Court of Appeals 24

C. Judgment of the United States Court of Appeals 35

D. Additional Question Suggested 37

CASES CITED

	Page
Adams v. City of Park Ridge (1961, 7th Cir.), 293 F. 2d 585	15
Allegheny County v. Frank Mashuda Co., 360 U. S. 185	14
American Mercury, Inc. v. Chase, 13 F. 2d 224 (1926)	17
Armstrong v. United States, 364 U. S. 40	12
Bantam Books v. Sullivan, 372 U. S. 58	17
Barnes v. Merritt (1967, 5th Cir.), 376 F. 2d 8	15
Bradford v. Sherwood, No. 21204, 9th Circuit	13
Buchanan v. Warley, 245 U. S. 60	12
Cobb v. City of Malden (1953, 1st Cir.), 202 F. 2d 701	15
Corsican Productions v. Pitchess (1964, 9th Cir.), 338 F. 2d 441	15
Cuyahoga River Power Co. v. Akron, 240 U. S. 462	10

Page

Dalche v. Levee Commissioners (1930), 46 F. 2d 340 — 9

Dombrowski v. Pfister, 380 U. S. 479 — 17

Ehrlich v. Glasner (1965, 9th Cir.), 352 F. 2d 119 — 15, 16, 17

Ehrlich v. Glasner (1967, 9th Cir.), 374 F. 2d 681 — 15, 16, 17

Foster v. Detroit (1966), 254 F. Supp. 655 — 9, 10, 11

Foster v. Herley (1964), 330 F. 2d 87 — 9, 10, 11, 12, 13

Gilmore v. Sandersville R. Co. (1955), 149 F. Supp. 725 — 13

Glicker v. Michigan Liquor Control Division (1947, 6th Cir.), 160 F. 2d 96 — 15

Hornsby v. Allen (1964, 5th Cir.), 326 F. 2d 605 — 15

Indian Refining Co. v. Ambraw, etc. District (1932), 1 F. Supp. 937 — 12

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 — 19

	Page
Marshall v. Sawyer (1962, 9th Cir.), 301 F. 2d 639	16
McGuire v. Sadler (1964, 5th Cir.), 337 F. 2d 902	14
Mosher v. Phoenix, 287 U. S. 29	10
New State Ice Co. v. Liebman, 28 U. S. 262	12
Olmstead v. United States, 277 U. S. 438	18
People of Colorado v. District Court (1953), 207 F. 2d 50	10
Portsmouth Co. v. United States, 260 U. S. 327	11
Progress Development Co. v. Mitchell (1961), 286 F. 2d 222	10, 11, 13
Richards v. Washington Terminal Co., 233 U. S. 546	11
Sanders v. Erreca, 377 F. 2d 960	2
Sherwood v. Bradford (1965), 246 F. Supp. 550	13

Page

United States v. General Motors,
323 U. S. 373 11

CONSTITUTIONS

United States Constitution:

5th Amendment 11

14th Amendment 16

STATUTES

18 U. S. C. A. §1951(b)(2) 17

28 U. S. C. §1254(1) 2

28 U. S. C. A. §1331 4, 7, 9, 13, 21

28 U. S. C. A. §1343 4, 7, 10, 21

42 U. S. C. A. §1983
Civil Rights Act 4, 7, 10, 13, 16, 22

TEXTS

16 Am. Jur. 2d 695
Constitutional Law §366 12

42 Am. Jur. 189
Property §4 12

Page

Nichols on Eminent Domain,
Vol. 2, pp. 367-369, 407 12

Nichols on Eminent Domain,
Vol. 6, p. 576 13

Restatement of Torts,
§767, p. 66 17

Shapo: "Constitutional Tort:
Monroe v. Pape and the Frontiers
Beyond" 60 Northwestern Univ.
L. Rev. 277 (1965) 14

Stoebuck, "Condemnation by Nuisance:
The Airport Cases in Retrospect
and Prospect" 71 Dickinson L. Rev.
207 at 217 (1967) 11

RULES

Rules of the Supreme Court of the
United States:

Rule 19(1)(b) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Louis Sanders, Fay Sanders, Harry Groode and Ruth Groode, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case.

CITATION TO OPINION BELOW

The decision of the U. S. District Court, Central District of California, was by means of an order which is unreported. (The grounds of the District Court decision are stated in the opinion of the Court of Appeals.) The opinion of the United States Court of Appeals for the Ninth Circuit, printed in Appendix "B" hereto, is reported at 377 F. 2d 960.

JURISDICTION

The judgment of the United States Court of Appeals, for the Ninth Circuit, was entered on May 25, 1967. A timely Petition for Rehearing was denied on July 28, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). (Also see Rule 19(1)(b)).

QUESTIONS PRESENTED

1. Where a complaint alleges that state employees acting under color of their office and of state law, made false representations, fraudulent threats of litigation, and purported to enact a condemnation resolution without any intention of acting upon it, all for the purpose of coercing property owners into cessation of lawful

construction on and development of their land, so that at some future time, after the value of the property has been severely impaired due to the cessation of construction and pendency of the condemnation resolution, only a portion of such property could be taken without paying to the owners just compensation, and where such owners in reliance on the promises and in response to the threats of the state employees ceased construction and thereby suffered massive damages, and where the threatened and promised condemnation of the land was never carried out as threatened and promised, has there been a violation of the owner's constitutional guarantee against deprivation of property without due process of law so as to give a right of civil action within the jurisdiction of the federal courts?

2. Where a case is dismissed by the U. S. District Court on grounds going to the merits of the allegations in the Complaint, and the appeal by briefs and argument addresses itself to such grounds without mention of jurisdiction by court or counsel and where months later the Court of Appeals concludes in its opinion sua sponte, without citation of authority and without opportunity to be heard on the point that federal jurisdiction is lacking, have appellants been effectively deprived of meaningful appellate review, and thereby of due process of law?

See also Appendix "D".

STATUTES INVOLVED

The statutes whose construction is involved herein are:

28 U. S. C. A. § 1331;

28 U. S. C. A. § 1343;

42 U. S. C. A. § 1983.

They are printed in Appendix "A".

STATEMENT

Mr. and Mrs. Louis Sanders and Mr. and Mrs. Harry Groode are the owners of a 4. 78-acre parcel of land. The legal description in the complaint places the land in the San Fernando Valley, a suburban area of Los Angeles. In the past, the land was used as a shopping center. With the passage of time the owners decided to transform the older shopping center into a larger, modern shopping center (R. Vol. 1, p. 30).

To accomplish the transformation, the owners undertook the complex and expensive task of subdividing, planning, financing, etc. Architects, engineers, surveyors, and contractors were engaged. The necessary plans, bonds and permits were obtained. Leases were entered into with tenants for the new shopping center, tenants from the old shopping center

moved out, contracts were let, large expenses and liabilities incurred, and work commenced.

At this point in time, Pierson Pedley, one of the Respondents herein, contacted the owners and informed them that their 4.78-acre parcel was about to be taken for a freeway. Pedley, a Senior Right-of-Way Agent of the California Division of Highways, purporting to speak as a State employee acting within the scope of his employment and under color of State authority, told the owners to cease the work underway on the new shopping center. Pedley backed up his demand with a threat: if the owners did not stop as requested, the California Department of Public Works would immediately file a condemnation action and obtain an injunction preventing Appellants from further work on their new shopping center (R. Vol. 1, pp. 30-31).

In fact, Pedley's threats and promises were false, and known to him to be false. In the first place, the State had no intention of acquiring the 4.78 acres. Moreover, the California Department of Public Works could not then institute an action against the owners, as in March, 1965, there was no condemnation resolution authorizing such an action, nor an agreement with the City of Los Angeles regarding connections between the proposed freeway and surface streets. The true state of affairs was unknown to the owners who relied on Pedley's status as Senior Right-of-Way Agent speaking for the State (R. Vol. 1, p. 31).

On May 25, 1965, Respondents Bradford,

Guthrie, Houghteling, Woolley, Whitehurst, Kofman and Payne passed Condemnation Resolution Number C-7011 purporting to authorize the condemnation of all of the subject property. In fact, such resolution was passed solely to give color to Pedley's earlier threats. No intention ever existed to implement such a resolution, and, in fact,. it never was implemented. Following the adoption of such resolution, Respondent Erreca failed to cause any good faith steps to be taken for the acquisition of subject property, whether by purchase or condemnation (R. Vol. 1, pp. 31-32).

As a direct result of the above-described threats and false promises of Pedley, and the acts of the other Respondents whereby the form of the State's exercise of its power of eminent domain were invoked in bad faith, the owners complied with what they believed to be a lawful state directive, and suffered massive damages, in that they ceased construction which was thereby rendered useless, and in the process incurred large expenditures and liabilities (R. Vol. 1, p. 33).

Ten months after Pedley's initial threats, no good faith steps toward the acquisition of the subject property for a freeway had been taken. The owners commenced the instant action on January 10, 1966 in the U. S. District Court for the Southern District of California, Central Division. An amended complaint was filed on February 15, 1966. The contents of the amended complaint allege the facts stated above. The amended complaint is described in great detail

by the Circuit Court Opinion (Appendix "B") which virtually quotes it. 1/

The District Court, on motion of Respondents, dismissed the action not for lack of jurisdiction, but on the grounds that:

1. The acts alleged in the Amended Complaint do not constitute a taking or damaging of property within the protection afforded by the United States Constitution; and

2. That the Respondents (other than Pedley and Erreca) were acting as members of the California Highway Commission exercising a discretionary function and their acts were immune from civil liability (R. Vol. 1, p. 98).

The District Court had no evidence or affidavits before it which would indicate that the Defendants were or were not exercising any discretionary function. Moreover, Pedley and Erreca were not members of the California Highway Commission.

After the action in the U. S. District Court was commenced, Respondents passed another condemnation resolution which no longer authorized a taking of the subject property, but only a

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1/ The Opinion contains a factual inaccuracy: The amended complaint expressly relied on 28 U. S. C. A. §1331 and 28 U. S. C. A. §1343 as well as on 42 U. S. C. A. §1983 (R. Vol. 1, p. 29).

fraction thereof. 2/

Thereafter, a motion for new trial or in the alternative for an order vacating the order of dismissal followed, and was denied by the District Court (R. Vol. 1, p. 198).

The District Court order of dismissal was then appealed to the U. S. Court of Appeals for the Ninth Circuit. The briefs in the Circuit Court addressed themselves to the issues of law arising from the grounds upon which the District Court dismissed the case (primarily "immunity"). The question of federal jurisdiction was neither raised, nor argued. The court of appeal heard arguments on January 13, 1967. The argument before the circuit court lasted for approximately one and one half hours. This uncommonly long period of time devoted to argument (far in excess of time requested by counsel) was caused by numerous questions to counsel from the bench, all of which addressed themselves to the issues as presented. The subject of jurisdiction was never mentioned in argument or in briefs.

On May 25, 1967, the Circuit Court rendered its opinion affirming the order of the District Court, on the grounds of lack of federal jurisdiction. The Circuit Court opinion cites no authority in support of its conclusion.

2/ As this Petition is being prepared, yet another resolution has been passed, further reducing the amount of Petitioners' land sought to be taken.

Following the decision by the court of appeals, a timely petition for rehearing was filed. The petition for rehearing was denied, and the suggestion therein for a rehearing en banc was rejected on July 28, 1967.

This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING CERTIORARI

1. The Decision Below Results in Conflict With Decisions of Other Circuits.

The question of redress of wrongs inflicted on property owners by State employees acting under color of State law and purporting to exercise a state's power of eminent domain, has been considered repeatedly by the U. S. Courts of Appeal in recent years.

In Foster v. Herley (1964), 330 F. 2d 87, the Sixth Circuit found State officials liable, resting the federal jurisdiction upon the provisions of 28 U.S.C.A. §1331. 3/

3/ Also see Foster v. Detroit (1966), 254 F. Supp. 655, and Dalche v. Levee Commissioners (1930), 46 F. 2d 340.

In Progress Development Co. v. Mitchell (1961), 286 F. 2d 222, the Seventh Circuit held State officials liable under 42 U. S. C. A. §1983 with federal jurisdiction resting upon 28 U. S. C. A. §1343.

In People of Colorado v. District Court (1953), 207 F. 2d at 50, 57, the Tenth Circuit has indicated (by dictum) that State officials abusing the power of eminent domain are personally liable for damages caused by such abuse, without specifically referring to a jurisdictional statute.

In contrast with Foster, Mitchell and People of Colorado, the opinion in the case at bench concludes that there is no jurisdiction in the federal courts to entertain law suits based upon wrongful acts done by state employees purporting to act under color of state eminent domain laws.

The decision below also conflicts with Cuyahoga River Power Company v. Akron, 240 U. S. 462, and Mosher v. Phoenix, 287 U. S. 29.

2. The Decision Below Creates Doubt As to What Constitutes a Deprivation of a Constitutionally Protected Right.

The decision below purports to reach its

result upon the fact that no physical seizure of Petitioners' land occurred. Yet in both Foster and Mitchell physical seizure was not an element of the wrong complained of. It would appear that the court below equated "deprivation" and "taking". This is clear error - it renders the 5th Amendment's separate protections against deprivation of property without due process of law and against taking of property without just compensation redundant.

An owner can be deprived of property by being deprived of the attributes of ownership (e. g. use, enjoyment, improvement, leasing, borrowing against land as security, etc.) which make up his "bundle of sticks". Property is not a thing - it is a right, or a group of rights. United States v. General Motors, 323 U. S. 373 at 378. And one can also readily see that the deprivation can be brought about in a variety of ways without anyone so much as laying a finger on the land in question. 4/ Richards v. Washington Terminal Co., 233 U. S. 546; Portsmouth

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4/ The notion that physical seizure is the indispensable ingredient of taking has been long discarded by the courts and writers. See United States v. General Motors, supra, 323 U. S. at 378. It has recently been aptly termed the "primordial view of a 'taking' ". Stoebuck, "Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect", 71 Dickinson L. Rev. 207 at 217 (1967). A fortiori, physical seizure is not necessary to accomplish a deprivation of a right.

Co. v. United States, 260 U.S. 327; Armstrong v. United States, 364 U.S. 40; Nichols on Eminent Domain, Vol. 2, p. 407. The point has been succinctly stated by the Court in Indian Refining Co. v. Ambraw, etc. District (1932), 1 F. Supp. 937 at 939-940:

> "... a law is considered as being a deprivation of property within the meaning of this constitutional guarantee if it deprives the owner of one of its essential attributes, destroys its value, restricts or interupts its common, necessary, or profitable use, hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it and thereby seriously impairs its value. These general principles apply not only to statutes enacted by the legislature but to the action of executive officers generally."

Also see Buchanan v. Warley, 245 U.S. 60 at 74; New State Ice Co. v. Liebman, 28 U.S. 262 at 278-280; 42 Am. Jur. 189, Property §4; 16 Am. Jur. 2d 695, Constitutional Law §366; Nichols on Eminent Domain, Vol. 2, pp. 367-369, 407.

Foster v. Herley, supra, 330 F.2d 87, and the case at bench are particularly illustrative of how a parcel of land can for all practical purposes be destroyed as far as its value and enjoyment to the owner are concerned, without anything resembling physical seizure taking place.

Yet, the two cases reach opposite conclusions.

There is a dearth of Supreme Court cases dealing with the applicability of the Civil Rights Act (42 U. S. C. A. §1983) to situations where economic harm has been inflicted by state officials acting under color of state law. As a result, federal courts have been in doubt as to the statutory basis of their jurisdiction in dealing with such problems. Foster and Mitchell illustrate the doubt. Both of these cases recognize the constitutionally impermissible harm inflicted, and grant relief for abuse of the power of eminent domain by state officials. Yet, Mitchell looks to the Civil Rights Act, while Foster finds jurisdiction arising directly under the Constitution of the United States within the meaning of 28 U. S. C. A. §1331. 5/ Still other federal courts have taken a third position and indicated that federal jurisdiction in non-diversity cases involving interference with property rights can be found in both of the above

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5/ Other federal courts have granted relief under 28 U. S. C. A. §1331 in situations involving the abuse of the power of eminent domain by state officials. See e. g. Gilmore v. Sandersville R. Co. (1955), 149 F. Supp. 725; Sherwood v. Bradford (1965), 246 F. Supp. 550 (appeal dismissed by U. S. Court of Appeals for the 9th Circuit, sub nom. Bradford v. Sherwood, No. 21204). Also see Nichols on Eminent Domain, Vol. 6, p. 576.

statutes. E. g. McGuire v. Sadler (1964, 5th Cir.), 337 F. 2d 902 at 905.

3. The Decision Below Creates Conflict With Federal Cases in Other Circuits Taking a Liberal View of Economic Rights Within Constitutional Protection.

There is yet another reason why it is important that certiorari be granted in the case at bench. Recently there has been lively litigation in the federal courts [6] to redress a variety of wrongs, involving state officials' interference with a host of economic rights of individuals.

The decision below raises doubt as to the jurisdictional basis for such litigation. For, as observed in Allegheny County v. Frank Mashuda Co., 360 U. S. 185 at 192, eminent domain is no more mystically involved with sovereign prerogative than a host of various governmental activities carried out by the states and their subdivisions. If federal jurisdiction is lacking to entertain lawsuits involving state officials' abuses of the power of eminent domain, then

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6/ See, Shapo, "Constitutional Tort: Monroe v. Pape and The Frontiers Beyond" 60 Northwestern Univ. L. Rev. 277 (1965).

jurisdiction to entertain lawsuits involving other interferences with economic rights by state officials abusing other state activities, is necessarily in doubt.

Nor can one find a valid distinction in the concept of physical seizure upon which the Court of Appeals relied in the case at bench. For many of the rights, which have been the subject of other federal lawsuits, are incapable of physical seizure. For example, Cobb v. City of Malden (1953, 1st Cir.), 202 F. 2d 701, involved interference with teachers' contract rights. Corsican Productions v. Pitchess (1964, 9th Cir.), 338 F. 2d 441, involved threats of interference with commercial distribution of motion pictures. Adams v. City of Park Ridge (1961, 7th Cir.), 293 F. 2d 585, involved interference with the right to solicit funds for a particular charity. Ehrlich v. Glasner (1965, 9th Cir.), 352 F. 2d 119 and its second appeal, Ehrlich v. Glasner (1967, 9th Cir.), 374 F. 2d 681, involved wrongful legal action and threats thereof by state officials. And in Glicker v. Michigan Liquor Control Division (1947, 6th Cir.), 160 F. 2d 96, Hornsby v. Allen (1964, 5th Cir.), 326 F. 2d 605, and in Barnes v. Merritt (1967, 5th Cir.), 376 F. 2d 8, the wrong complained of consisted of an arbitrary denial

of a liquor license by local officials. 7/

In all of the above cases, and others, nothing was taken - nothing was physically seized. There was a deprivation of a right within the meaning of 42 U.S.C.A. §1983. Necessarily, all of the above cases have concluded that an interference with an economic right, causing a substantial economic detriment to the wronged person, constitutes a deprivation of property within the meaning of the 14th Amendment. The case at bench reaches a conflicting conclusion.

Of the above cases, the two Ehrlich opinions (352 F. 2d 119 and 374 F. 2d 681) are particularly noteworthy in juxtaposition with the case at bench. The second dismissal of the Ehrlich complaint was ordered by the same U. S. District Judge on the same day as the dismissal of the amended complaint in the case at bench. The

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7/ It seems incongruous that a citizen who has been denied a state's grant of authority to engage in the liquor business or denied access to gambling casinos (Marshall v. Sawyer [1962, 9th Cir.], 301 F. 2d 639) can find protection in the federal courts, while his neighbor, minding his own business, can be sought out by state officials, subjected to threats and fraud, coerced into a posture where he suffers massive damages, and yet find himself beyond the pale of federal judicial protection under the Constitution.

dismissal was on the same grounds: "immunity" of state officials (374 F. 2d at 682). A principal ingredient of both complaints was an allegation of coercive threats of wrongful legal action by state officials (see 352 F. 2d at 121). The opinions in both Ehrlich cases and the case at bench, were written by the same Circuit Judge. And yet, Ehrlich was reversed, with federal jurisdiction accepted as of course, while the case at bench was affirmed, the Court of Appeals noting that " ... the threat and promise of Pedley and the adoption by the appellees ... of the condemnation resolution imposed no legal restraint on appellants from continuing the construction of their shopping center and the further use and development of their property, which activities the appellants were at all times free to pursue." 377 F. 2d at 963-964.

Thus, in addition to the problem of conflict of decision discussed above, the case at bench also gives rise to an important question going to the heart of the relationship between government and the governed. It has been early recognized that the threat of litigation can be a powerful and brutal weapon. See Restatement of Torts, §767, p. 66. Also see 18 U. S. C. A. §1951(b)(2).

The celebrated case of American Mercury, Inc. v. Chase, 13 F. 2d 224, applied this point in 1926. It has found expression in other cases, e. g., Dombrowski v. Pfister, 380 U. S. 479. The rationale underlying the Court's reasoning was succinctly stated in Bantam Books v. Sullivan, 372 U. S. 58 at 68:

"People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."

The opinion below in the case at bench turns its back on the above principle and chooses to overlook the potency and chilling effect of an official's coercive threat. Thereby, the court below embraced a view which encourages not merely an arm's length relationship between an individual and his government's officials, but rather an outright hostile relationship.

In view of the current expanding activities of governments, federal, state and local, the words of Mr. Justice Brandeis in his famous dissent in Olmstead v. United States, 277 U.S. 438 at 485, have even more meaning today than they had when uttered:

"Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example."

The compelling, if unpleasant, conclusion forced upon the reader of the opinion below is that fraud and coercive threats on the part of a state employee directed at an admittedly law-abiding citizen, are the norm which the government can teach by example without offending the constitutional notion of fairness. It is respectfully submitted that such a conclusion runs counter to the fundamental notion of fairness implicit in the Anglo-American system of

jurisprudence. It runs counter to our society's tenet that government is a beneficial force, rather than a tyrant. Petitioners submit that such a conclusion is repugnant to the concept of due process of law, described by Mr. Justice Frankfurter as: " ... a profound attitude of fairness between man and man, and more particularly between the individual and government, ... " (Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 at 162.)

CONCLUSION

There is a conflict among the circuits. They are in disagreement as to which statute confers jurisdiction upon federal courts to hear cases such as the one at bench, and as to whether such jurisdiction exists at all. The Supreme Court cases which have spoken directly on this point, in favor of federal jurisdiction, have been disregarded.

There is also conflict as to what constitutes a deprivation of a constitutionally protected right. Decisions run the gamut from extending liberal protection to intangible rights, to a refusal to find a constitutional violation unless physical seizure is alleged.

Ultimately, in the case at bench, the rights of admittedly innocent people to lawfully use their own land have been outrageously violated. The economic end-product of the life-times of two generations of two families has been crippled

by coercive acts of state employees - acts which even the court below recognized as fraudulent.

Only this Court can resolve these conflicts. Such resolution is needed.

For reasons having to do with the pragmatic problem of settling conflicts of opinion among circuits, and doubts as to foundations of federal jurisdiction, as well as for reasons of grave public policy going to the core of interaction between individual citizens and their government, Petitioners respectfully pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

Statutes Involved

Title 28 U. S. C. A. §1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub. L. 85-554, § 1, 72 Stat 415.

Title 28 U. S. C. A. § 1343.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the depriva-

tion of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

Title 42 U.S.C.A. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979.

APPENDIX "B"

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS SANDERS, FAY SANDERS, HARRY GROODE and RUTH GROODE, Appellants, vs. JOHN ERRECA, ROBERT B. BRADFORD, JAMES A. GUTHRIE, JOSEPH C. HOUGHTELING, ROGER S. WOOLLEY, WILLIAM S. WHITEHURST, ABRAHAM KOFMAN, FRANKLIN S. PAYNE, PIERSON L. PEDLEY, Appellees.	)	No. 21,153

[May 25, 1967]

On Appeal from the United States District Court for the Southern District of California, Central Division
[Now United States District Court for the Central District]

Before: BARNES, JERTBERG and DUNIWAY, Circuit Judges JERTBERG, Circuit Judge:

Appellants (plaintiffs in the District Court) appeal from an order of the District Court dismissing without leave to amend their amended complaint and action wherein they seek to recover from appellees (defendants in the District Court) damages under the Civil Rights Act (42 U. S. C. § 1983).

The original complaint was filed on January 10, 1966, and an amended complaint was filed on February 15, 1966.

The dismissal of the action on March 14, 1966, with prejudice, following a hearing on appellees' motion to dismiss on February 28, 1966, was made on the grounds:

1. That the acts alleged in the amended complaint do not constitute a taking or damaging of property within the protection afforded by the United States Constitution; and

2. That the appellees, who are alleged to be members of the California Highway Commission, were acting as members of said Commission exercising a discretionary function and that their action is, therefore, immune from civil liability.

On March 24, 1966, appellants moved the District Court for a new trial pursuant to Rule

59, or in the alternative, under Rule 60(b) for an order vacating the order of dismissal of appellants' action and permitting appellants to file a second amended complaint based upon newly discovered evidence which, by due diligence, could not have been discovered prior to the court's ruling.

Following hearing on appellants' motion on April 18, 1966, the motion was denied on April 21, 1966, on the grounds that:

1. The new facts failed to warrant the filing of an amended complaint; and

2. The failure of appellants to discover the new evidence was due to appellants' lack of diligence.

The amended complaint may be summarized as follows:

That the appellants are the owners of a certain parcel of land described as Lots 1 and 2, of Tract No. 22236, in the City of Los Angeles, County of Los Angeles, as shown on map recorded in Book 738, pages 24 and 25 of Maps, in the office of the County Recorder of Los Angeles County, which has an area of approximately 4.78 acres;

That appellants commenced a project whereby Lot 2 of the above described property would be transformed from its present older shopping center use into a larger, modern shopping center, and to that end appellants have subdivided,

obtained the necessary bonds and permits, employed the services of architects, engineers, contractors and surveyors for the purpose of designing and constructing the new shopping center, as well as lawyers to draw leases therefor;

That to insure the commercial success of the new shopping center appellants have negotiated and entered into leases with prospective tenants for the new shopping center, including Crocker Citizens National Bank and other business enterprises; that contracts had been let and work started in March 1965, and that tenants from the old shopping center moved out;

That the appellees are Pierson L. Pedley, employed as a Senior Right-of-Way Agent for the Department of Public Works of the State of California Division of Highways; John Erreca, Director of the California Department of Public Works and Administrative Officer of the California Highway Commission; Robert B. Bradford, James A. Guthrie, Joseph C. Houghteling, Roger S. Woolley, William S. Whitehurst, Abraham Kofman and Franklin S. Payne, members or officers of the Highway Commission of the State of California;

That in March, 1965, appellee Pierson Pedley informed appellants that all of the property above described would be taken in eminent domain by the State of California for the building of a freeway and requested appellants to cease construction and any further development of the property and stated that unless appellants

interrupted and ceased the work under way on the new shopping center and refrained from further work thereon, the California Department of Public Works would immediately file a condemnation action and obtain an injunction preventing appellants from further work on the new shopping center;

That such statements were made by Pedley for the purpose of inducing appellants to discontinue the development of the property; that appellants, relying on the statements of Pedley, stopped the construction of the new shopping center; that the statements made by Pedley were false and known by him to be false since in March, 1965 no condemnation action by the Department of Public Works could be commenced since at that time the members of the Highway Commission had not adopted a condemnation resolution, and no agreements had been reached with the City of Los Angeles regarding connections between the proposed freeway and surface streets, which facts were unknown to the appellants at that time who relied on the representations of Pedley;

That approximately two months later, and on May 25, 1965, the appellees named as members of the Highway Commission passed Condemnation Resolution No. C-7011, authorizing the condemnation of all of appellants' property above described for highway purposes. A copy of the resolution is attached to and made a part of the amended complaint;

That such resolution was passed in bad

faith to cloud the title to appellants' property; that said resolution has not been implemented as its mere passage accomplished the goal of the appellees, and there appeared to be no intent to implement the resolution in the foreseeable future; that notwithstanding the adoption of such resolution appellee Erreca has failed to cause any good faith steps to be taken for the acquisition of the property;

That Erreca and Pedley have wrongfully and in bad faith caused the acquisition of said property to be delayed for the purpose of destroying any possibility of the completion of the appellants' shopping center and for the purpose of destroying the value of said property;

That by reason of the fraudulent representations by Pedley, and by reason of the passage of the resolution by the members of the Highway Commission, appellant's property has effectively been taken by depriving appellants of their right and opportunity to use, develop, lease and encumber their property; that by reason of the acts of appellees the property cannot be leased nor can loans be secured against it; that no compensation for taking the appellants' property has been made to appellants in violation of the Fifth and Fourteenth Amendments to the United States Constitution;

That in making fraudulent representations for the purpose of inducing appellants to discontinue work on the new shopping center, and in passing the condemnation resolution in bad faith, and without making any compensation to

appellants for the taking and damaging of appellants' property, caused by the above acts, appellees have abused their position and power as state employees and officers, and under color of state statute, ordinance, regulation, custom and usage have subjected appellants to the deprivation of appellants' rights secured by the United States Constitution and laws which provide that appellants' property cannot be taken except for public use and then only upon payment of just compensation;

That in discontinuing the construction of the new shopping center, and in reliance on the fraudulent representations of Pedley and the passage of said condemnation resolution, appellants were forced to incur liabilities for accounts payable to persons and corporations from whom services and equipment were obtained by appellants for the new shopping center; such accounts payable are in the approximate amount of $164,252.80. That in addition appellants, as of November 1, 1965, had actually paid $54,147.63 to persons and corporations from whom services and supplies were obtained in connection with the development of the new shopping center; that such services, supplies and equipment have been of no benefit to appellants; that in addition, by reason of the acts of the appellees described above, appellants have been deprived of the use and rents of the subject property from March, 1965, and have not been compensated therefor.

The amended complaint seeks judgment against appellees in the sum of $250,000.00 and

for an order commanding appellees Erreca and Pedley to either proceed with the condemnation of appellants' property, or cease interfering with appellants' construction thereon, and rights.

The appeal in this case also presents for review by us the propriety of the order of the District Court denying appellants' alternative motion for a new trial or for an order vacating the order of dismissal of appellants' action and permitting the filing of a second amended complaint. The motion was based on newly discovered evidence.

The new evidence consists of: (1) a published article by appellee, Houghteling, purporting to show that the acts performed by the appellees who were members of the Highway Commission are not discretionary in character but rather give rubber stamp approval to the acts of appellee, Erreca, the Director of the California Department of Public works; and (2) the adoption on February 16, 1966, by the appellees, named as members of the Highway Commission, of Condemnation Resolution C-7298, authorizing the condemnation of only portions of Lots 1 and 2, together with specified rights and easements to enter upon the remaining portions of Lots 1 and 2, and the filing by appellees on March 7, 1966, of a complaint in eminent domain in the Superior Court of the State of California in and for the County of Los Angeles, Action No. 880137, to condemn the property described in the Condemnation Resolution of February 16, 1966. Affidavits in support of, and in opposition to, the motion were filed.

We have considered the memoranda, documents and affidavits submitted in connection with the motion. We are unable to say that the District Court abused its discretion in refusing to grant a new trial or in refusing to permit the filing of a second amended complaint.

The allegations of the amended complaint charge that appellants' real property was not taken for public use by the State of California because the appellees, acting fraudulently, in bad faith, in abuse of their duties as state officials, and under color of state law, failed to cause condemnation proceedings to be filed in court for the purpose of acquiring such real property for public use. We are aware of no federal right, statutory or constitutional, under which a private person may compel a sovereign to take such person's private property for public use and secure just compensation therefor. There is no allegation in the amended complaint that any property or property rights claimed by appellants were taken by appellees for public use. The State of California is not a party to the action. Hence, appellants do not, and cannot claim that any property or any claimed property right has been taken for public use and for which they are entitled to just compensation under the clause of the Fifth Amendment which provides: " ; nor shall private property be taken for public use, without just compensation", or under the clause of the Fourteenth Amendment which provides: " ; nor shall any state deprive any person of * * *, * * *, or property, without due process of law;".

The gist of the amended complaint is that appellants suffered a claimed monetary loss in the claimed sum of $250,000.00 since they stopped construction of the new shopping center and the further use and development of their property because of the threat of Pedley to get an injunction, and their reliance upon his promise that a condemnation action would be immediately filed. Clearly, the threat and promise of Pedley and the adoption by the appellees named as members of the Highway Commission of a condemnation resolution imposed no legal restraint on appellants from continuing the construction of their shopping center and the further use and development of their property, which activities the appellants were at all times free to pursue.

There is no allegation in the amended complaint that appellees entered into possession of any part of appellants' property, trespassed thereon, or physically interfered in any way with appellants' control and dominion of their property.

In essence, the amended complaint is one to recover a claimed monetary loss based upon fraud and deceit, cognizable perhaps under state law in a state court, but the claim does not invoke the jurisdiction of the federal court in this non-diversity action. In order to do so, the amended complaint must allege facts which show that appellants were subjected to the deprivation of a right, privilege or immunity secured by the Constitution and laws of the United States. Appellants have failed to do so. The allegations

that the acts of appellees violated the provisions of the Fifth and Fourteenth Amendments appear to us to be a pretext to invoke federal jurisdiction.

In view of our holding we deem it unnecessary to pass upon other questions presented on this appeal.

The order appealed from is affirmed.

APPENDIX "C"

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS SANDERS, FAY SANDERS, HARRY GROODE and RUTH GROODE, Appellants, vs. JOHN ERRECA, ROBERT B. BRADFORD, JAMES A. GUTHRIE, JOSEPH C. HOUGHTELING, ROGER S. WOOLLEY, WILLIAM S. WHITEHURST, ABRAHAM KOFMAN, FRANKLIN S. PAYNE, PIERSON L. PEDLEY, Appellees.	)	No. 21,153

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of

California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 25, 1967

APPENDIX "D"

Additional Question Suggested

In the light of Rule 23 (1)(c) and the Court's admonition in Irvine v. California, 347 U. S. 128, 129, the following additional question is also suggested:

> Are state employees immune from civil liability in federal courts, where it is alleged that such employees and officials acting under color of their office have wrongfully and fraudulently deprived a plaintiff of his property rights secured by the due process clause of the 14th Amendment?

SUBJECT INDEX

	Page
Questions Presented	1
Supplemental Statement	2
Reasons for Denying Certiorari	4
1. The Circuit Court Granted Petitioners Full Review on All Issues Raised in the Pleadings	4
2. The Circuit Court's Decision Is Consistent With Other Circuit Opinions Dealing With Similar Situations	7
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases	Page
Abernathy v. Carpenter, 208 F. Supp. 793	10
Beistline v. San Diego, 256 F. 2d 421	5, 9
Binderup v. Pathe Exchange, 263 U.S. 291, 44 S. Ct. 96, 68 L. Ed. 308	4
Devine v. Los Angeles, 202 U.S. 313, 26 S. Ct. 652, 50 L. Ed. 1046	10
Foster v. Detroit, 254 F. Supp. 655	9, 10
Foster v. Hurley, 330 F. 2d 87	9, 10
Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423	6, 10
Holt v. Indiana Mfg. Co., 176 U.S. 68, 20 S. Ct. 272, 44 L. Ed. 374	10
Ortega v. Ragen, 216 F. 2d 561	10
People of Colorado v. District Court, 207 F. 2d 50	9
Progress Development Co. v. Mitchell, 286 F. 2d 222	8, 9, 10
Ream v. Handley, 359 F. 2d 728	6, 7, 8, 9, 10
Screven Co. v. Brier Creek Hunting and Fishing Club, 202 F. 2d 369, cert. den. 345 U.S. 994, 73 S. Ct. 1136, 97 L. Ed. 1402	5, 9
Shoemaker v. U.S., 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170	10

Statutes	
United States Code, Title 28, Sec. 1331	5
United States Code, Title 28, Sec. 1343	5

IN THE

Supreme Court of the United States

October Term 1967
No. 767

LOUIS SANDERS, *et al.*,

Petitioners,

vs.

JOHN ERRECA, *et al.*,

Respondents.

Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Questions Presented.

1. Did the Circuit Court deny Petitioners due process when it affirmed the judgment of the District Court on the grounds that the complaint failed to allege facts sufficient to invoke the jurisdiction of the Federal Court where one of the major issues involved was whether petitioners had sufficiently alleged a deprivation of a constitutionally protected property right?

2. Where a resolution authorizing the condemnation of land is passed allegedly to cloud petitioners' title subsequent to threats of litigation, and a condemnation action is initiated some ten months later, has such threatened litigation and delay causing petitioners to interrupt the redevelopment of their property created a federal claim under the Constitution sufficient to invoke the original jurisdiction of the District Court?

Supplemental Statement.

The amended complaint depicts the petitioners as landowners who were in the process of transforming their property into a new shopping center when in March 1965 respondent Pedley, a state agent, informed the petitioners that their land was needed for a freeway and requested them to cease work on the new shopping center. If petitioners did not cease development they were informed that litigation would be commenced by the California Department of Public Works to prevent further development [R. Vol. 1, pp. 30-31].

Subsequently, in May 1965 respondent highway commissioners passed a resolution authorizing the condemnation of all of petitioners' land and improvements for freeway purposes, which resolution allegedly cast a cloud on the title of petitioners' property. The statements by Pedley are claimed to be fraudulent because at the time they were made no resolution was in effect authorizing condemnation proceedings [R. Vol. 1, p. 31]. No action was taken to file condemnation proceedings until March 7, 1966 [R. Vol. 1, p. 145] approximately ten months after passage of the above mentioned resolution. The condemnation proceedings are predicated on an amended resolution which authorized the taking of a substantial portion of petitioners' property instead of their total holdings [R. Vol. 1, p. 156].

The petitioners claim that the above actions by state officers effected a "taking" of property without compensation [R. Vol. 1, pp. 32-33].

The District Court dismissed the action because the acts alleged did not constitute "a taking or damaging of property within the protection afforded by the United

States Constitution" and further that the highway commissioners were immune from civil liability [R. Vol. 1, p. 98].

A motion for new trial or for other relief based on newly discovered evidence was denied [R. Vol. 1, pp. 198-199].

An appeal to the United States Court of Appeals for the Ninth Circuit followed. Petitioners' opening brief dealt largely with the immunity issue and to a lesser degree with the issue of whether the acts alleged showed a constitutional deprivation of property rights (App. Op. Br. pp. 34-39). Respondents' brief, on the other hand, was aimed at whether a federal claim had been stated sufficient to invoke the District Court's jurisdiction (Appellees' Br. pp. 6-17, specifically at pp. 6. 9 and 13) and immunity. Petitioners' reply brief again stressed the immunity issue with but minor attention to the existence of a constitutional right (App. Reply Br. pp. 10-13). Subsequent to lengthy argument the Circuit Court affirmed on the grounds that the "claim does not invoke the jurisdiction of the Federal Court" because it failed to "allege facts which show that appellants were subjected to the deprivation of a right, privilege or immunity secured by the Constitution and laws of the United States" (377 F. 2d 960, at p. 964).

Following the denial of appellants' petition for rehearing they filed this petition for a writ of certiorari in substance asking for review of the Circuit Court's decision on the grounds that they were denied due process by the Circuit Court, and that there is a conflict in Circuit decisions.

REASONS FOR DENYING CERTIORARI.

1. The Circuit Court Granted Petitioners Full Review on All Issues Raised in the Pleadings.

Petitioners express surprise at the Circuit Court's determination that the facts they allege failed to show a constitutional violation so as to invoke the jurisdiction of the Federal Court. They apparently quibble about the distinction between lack of jurisdiction of the subject matter and the lack of sufficient facts to state a federal claim. While the difference between lack of jurisdiction and failure to state a federal claim may be important in some cases (*Binderup v. Pathe Exchange* (1923), 263 U.S. 291, 44 S. Ct. 96, 68 L. Ed. 308) in the instant action it is a distinction without a difference.

Respondents' motion to dismiss in the trial court went directly to the absence of facts on which to predicate a federal claim. Such an attack necessarily draws into question the District Court's jurisdiction.

> "The court below had jurisdiction to determine its own jurisdiction on the ground of a federal question. . . . We are not holding that the complaint fails to state a cause of action upon which relief may be granted in a state court, but that appellee's claim or right does not arise out of the Constitution or laws of the United States. Whether the complaint states a cause of action arising under the Constitution and laws of the United States is for the court, not the pleader, to determine. . . . Where neither the constitutional provision nor any act of Congress affords a remedy to any person the mere assertion by a plain-

tiff that he is entitled to such a remedy cannot be said to satisfy federal jurisdictional requirements."

Screven Co. v. Brier Creek Hunting and Fishing Club (1953), 202 F. 2d 369, certiorari denied 345 U.S. 994, 73 S. Ct. 1136, 97 L. Ed. 1402.

In *Beistline v. San Diego* (1958), 256 F. 2d 421, fraud was charged against city officials in the acquisition of plaintiff's land for a "private" purpose. The Ninth Circuit explained the jurisdictional defect in the following manner at page 425:

"Every case of fraud and duress does not involve a constitutional question of due process . . . the facts here, interpreted most favorably toward appellant, show no deprivation of due process by the City of San Diego in the acquisition of the property. . . .

"If the plaintiff can plead and prove a good case of fraud and duress, his remedy lies as it does with any other litigant, in the state court.

"We affirm the judgment below for lack of jurisdiction."

Thus, while the petitioners may have set forth a cause of action for common law fraud below they must still satisfy the jurisdictional requirement of a federal claim. This was the issue before the Circuit Court.

The above cases deal with §1331 of Title 28 United States Code. Section 1343 is similarly interpreted, and limits jurisdiction to cases where a federal claim is based on a factual showing of the denial of a personal constitutional right.

Hague v. Committee For Industrial Organization (1939), 307 U.S. 496, 531, 59 S. Ct. 954, 83 L. Ed. 1423;

Ream v. Handley (1966), 359 F. 2d 728.

How petitioners were misled in missing the jurisdictional issue defies explanation. Indeed their arguments attempted to convince the courts below that the facts alleged showed a constitutional deprivation of property rights, a *sine qua non* to their right of recovery. Respondents moved to dismiss the amended complaint on three grounds: (1) that no taking or damage of property rights was shown, (2) immunity of the highway commissioners, and (3) that fraud and bad faith were not adequately pleaded. The jurisdictional point should have been brought home to petitioners when the motion to dismiss was granted as to grounds 1 and 2 and denied as to ground 3.

Petitioners' inference that the Circuit Court trapped them by deciding the case for lack of jurisdiction demonstrates a disregard of the record and a failure to reach issue with respondents in that court. It has been clear from the inception of this case that the attack on the complaint was the lack of the trial court's power to go on to the merits because no federal claim was stated.

Petitioners' choice to underemphasize the issue was theirs and not the error of the court below. The distinction drawn between jurisdiction of the subject matter and federal claim jurisdiction is an exercise in sophistry.

Petitioners received full appellate review on the question of whether they stated a federal claim.

2. The Circuit Court's Decision Is Consistent With Other Circuit Opinions Dealing With Similar Situations.

The rule urged by petitioners on this Court is strict federal liability for all misconduct by every state official in the exercise of his office. The court below correctly refused to recognize such a rule.

The essence of the Circuit Court's opinion is that the threats of litigation by state officials, including passage of a condemnation resolution and subsequent delay in appropriating the owners' property by eminent domain did not constitute a federal claim.

Similar facts were presented to the Seventh Circuit in *Ream v. Handley, supra,* 359 F. 2d 728. There the landowners complained that they were unable to sell lots in their residential subdivision after 1956 because defendants published the location of a highway affecting their property and refused to acquire their property by purchase or condemnation along with other properties in the vicinity. Incidental damages were also claimed for threats to enter and trespass on the owner's land. Reaching the same result as the Ninth Circuit, the court held at page 731:

> "These statutory sections (28 U.S.C.A. §§ 1331, 1343) are jurisdictional. But it is necessary for plaintiffs to find another law which authorizes the commencement of an action. In their search they point to the fourteenth amendment and 42 U.S.C.A. § 1983. Regarding the former, we already have held that no 'genuine and present controversy' exists under that amendment. . . . The controlling authority, however, seems to hold that

the civil rights statutes, of which § 1983 is one, do not confer jurisdiction where a person seeks only to protect property or monetary rights. . . .

"In any event, plaintiffs have no action under § 1983 because said section creates a cause of action for only the violation of federal rights. . . .

"Thus an action for slander of title or trespass is not a right created by the constitution or any federal statute relied on by plaintiffs."

Petitioners, like the *Reams,* relied heavily on *Progress Development Co. v. Mitchell* (1961), 286 F. 2d 222. It is distinguishable as follows:

"However, in that case the individual defendants allegedly conspired to deprive plaintiffs of equal protection of the laws by inducing the park board to condemn plaintiffs' land and inducing village trustees to abuse enforcement of the building code for the purpose of denying plaintiffs' right to conduct corporate enterprises. Here, the fourteenth amendment is involved remotely, if at all. It is defendants nonaction (refusal to purchase or condemn any of plaintiffs' land), coupled with statements of public officials and newspaper publicity, that is the crux of plaintiff's complaint. But plaintiffs do not allege that the highway in question will not in fact be built in the location mentioned, nor that any of the defendants has taken, or threatens to take, their land for such a use without just compensation therefor."

Thus the same circuit which decided the *Mitchell* case denies jurisdiction on facts closely akin to those in the instant action. Based on this similarity of allegations there is no conflict between the seventh and ninth circuits. In accord with the views expressed in

Ream is the decision in *Beistline v. San Diego, supra,* 256 F. 2d 421, where the plaintiffs claimed they were forced to sell land to the city under threat of condemnation proceedings amounting to fraud and duress by city officers who allegedly acquired the property for private purposes. Such facts were held insufficient to bestow jurisdiction on the federal court.

Threats and force by county officers to remove an obstruction from a roadway which the owner claimed was private property did not involve a substantial federal question in *Screven Co. v. Brier Creek Hunting and Fishing Club, supra,* 202 F. 2d 369, although the court recognized that an incidental constitutional question might "lurk in the background of the record."

People of Colorado v. District Court (1953), 207 F. 2d 50 does not support petitioners' position since the injunction granted by the trial court was vacated on appeal. The dictum applies to a factual situation where established access rights were being destroyed without the availability of a procedural remedy to obtain compensation.

Finally, the *Foster* opinions (*Foster v. Hurley* (1964), 330 F. 2d 87 and *Foster v. Detroit* (1966), 254 F. Supp. 655) are similar to the *Mitchell* case and the decisions are consistent with it but are entirely distinct from the instant action. The crucial difference in *Foster* is demonstrated by the fact that the owners were denied any compensation for existing improvements which were destroyed while a condemnation action had been pending for ten years and then dismissed. As in the *Mitchell* case the *Fosters* were denied permission to improve their existing structure by city ordinance so that the structure was required to be de-

molished. In a second condemnation action the *Fosters* received no compensation for the structure which they had been compelled to demolish. "Thus, plaintiffs did not received just compensation for the taking of their property." (254 F. Supp. 666.)

Foster as well as *Mitchell* are therefore distinguishable from *Ream*[1] and the instant case on the basis of the facts alleged. No conflict therefore exists among the circuits. Petitioners' claim of delay in instituting the action is a far cry from the city's actions in *Foster* where suit was actually commenced and a *lis pendens* recorded, legally clouding the title to the property.

Generally, delay in commencing proceedings after their authorization does not constitute the deprivation of a constitutional right. *Shoemaker v. U.S.* (1892), 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

The crux of petitioners' complaint is an attempt to recover damages for a cloud on their title caused by the prospect of litigation authorized by the condemnation resolution. The federal courts are not for such purposes. *Devine v. Los Angeles* (1906), 202 U.S. 313, 26 S. Ct. 652, 50 L. Ed. 1046.

As in *Devine* above the court below correctly analyzed petitioners' grievance and adopted the reasoning of this Court in reaching its conclusion:

> "The averment of unconstitutionality is a mere pretext to obtain that jurisdiction." (202 U.S. 335, 50 L. Ed. 1054.)

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[1]Other authorities in accord are *Holt v. Indiana Mfg. Co.* (1900), 176 U.S. 68, 72, 20 S. Ct. 272, 44 L. Ed. 374; *Hague v. Committee for Industrial Organization* (1939), 307 U.S. 496, 531, 59 S. Ct. 954, 83 L. Ed. 1423; *Abernathy v. Carpenter* (1962), 208 F. Supp. 793, 794; *Ortega v. Ragen* (1954), 216 F. 2d 561, 562.

Conclusion.

The decisional conflict perceived by petitioners does not exist unless every common law action dealing with the title and use of land needed for public use is said to be within the jurisdiction of the federal courts. False pretenses notwithstanding, petitioners seek recovery for the effect of a condemnation resolution and prospective litigation on the title and use of property. At best this is an action to recover damages for slander of title based on fraud or duress. The constitutional guarantee is not so broad. It is limited to the taking or damaging of a property right without fair compensation.

Petitioners do not claim that their property is not being taken for a public purpose and they do not show that just compensation will be denied when the land is eventually acquired.[2] California courts are equal to such task. In the absence of such a showing on the face of the complaint, no federal claim is stated. No jurisdiction exists.

For the above reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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[2]Eminent domain proceedings in the state court entitled *People v. Groode*, Los Angeles County Superior Court No. 880137, are presently pending and scheduled for trial on February 26, 1968.

SUPREME COURT, U. S.

FILED
DEC 1 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. 767

LOUIS SANDERS, et al.,

Petitioners,

vs.

JOHN ERRECA, et al.,

Respondents.

PETITIONERS' REPLY BRIEF (IN SUPPORT OF PETITION FOR CERTIORARI)

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TOPICAL INDEX

		Page
Table of Authorities		ii
INTRODUCTION		1
I	RESPONDENTS' PRINCIPAL AUTHORITY DRAMATIZES THE HOPELESS CONFLICT AMONG THE CIRCUITS	2
II	RESPONDENTS' ARGUMENTS RE JURISDICTION RELY ENTIRELY ON SUPERSEDED AUTHORITY	5
III	WHETHER OR NOT THE ACTS COMPLAINED OF CONSTITUTE A CAUSE OF ACTION UNDER STATE LAW, HAS NO BEARING ON FEDERAL JURISDICTION	6
CONCLUSION		7

TABLE OF AUTHORITIES

Cases	Page
Adams v. City of Park Ridge (7th Cir.), 293 F. 2d 585	3
Bell v. Hood (1946), 327 U. S. 678	5, 6, 7
Lowe v. Manhattan Beach City School Dist. (1955, 9th Cir.), 222 F. 2d 258	3
Marshal v. Sawyer (1962, 9th Cir), 301 F. 2d 639	4
McGuire v. Sadler (1964, 5th Cir.), 337 F. 2d 902	3
Progress Development Corp. v. Mitchell (7th Cir.), 286 F. 2d 222	3
Ream v. Handley (1966, 7th Cir.), 359 F. 2d 728	2, 3, 4
Screws v. United States (1945), 325 U. S. 91	6
Sheridan v. Williams (1964, 9th Cir.), 333 F. 2d 581	2
Ex Parte Virginia (1880), 100 U. S. 339	2

Page

Constitution

United States Constitution:

Fourteenth Amendment 8

IN THE

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PETITIONERS' REPLY BRIEF (IN SUPPORT OF PETITION FOR CERTIORARI)

INTRODUCTION

Respondents' central premise is the long discarded doctrine of the Reconstruction period, that violation of state law gives rise to a state remedy, which somehow becomes a substitute for federal jurisdiction.

(See Ex Parte Virginia (1880), 100 U.S. 339).

I

RESPONDENTS' PRINCIPAL AUTHORITY DRAMATIZES THE HOPELESS CONFLICT AMONG THE CIRCUITS

Illustrative of the confusion now present in Circuit Court decisions, is Ream v. Handley (1966, 7th Cir.), 359 F. 2d 728, relied on heavily by Respondents. (Ream held that the facts therein had not ripened into a case or controversy, and hence the question of jurisdiction could not be reached as there was no case of which a court could take jurisdiction: "We hold that no 'genuine and present controversy' exists herein...." 359 F. 2d at 730.)

However, the Court's attention is respectfully invited to the statement in Ream (359 F. 2d at 731) that the federal courts lack jurisdiction under the Civil Rights Act to entertain civil actions for interferences with "property or monetary rights". That conclusion is impossible to reconcile with the many recent Federal cases cited at p. 15 of the Petition for Certiorari. (Also see Sheridan v. Williams (1964, 9th Cir.), 333 F. 2d 581.)

Moreover, in addition to the above conflict of decision, Ream creates a conflict within the

7th Circuit (Compare Progress Development Corp. v. Mitchell, 286 F. 2d 222, and Adams v. City of Park Ridge, 293 F. 2d 585, both granting relief under The Civil Rights Act for deprivation of "property or monetary rights").

It was noted in the Petition for Certiorari (p. 13) that the Circuit Courts which have granted relief in cases involving abuse of the power of eminent domain, cannot agree on the basis for granting relief. Similar disagreement exists between Circuit Courts denying relief, and Ream illustrates it.

Ream, although denying relief, as did the case at bench, conflicts head-on with its reasoning. Ream indicates that an allegation of a threat of taking without just compensation may confer federal jurisdiction (359 F. 2d at 730), while the case at bench indicates the contrary (377 F. 2d at 963-964). Ream indicates that allegations of trespass do not confer federal jurisdiction (359 F. 2d at 731) while the case at bench suggests the contrary (377 F. 2d at 964). Cf. McGuire v. Sadler (1964, 5th Cir.), 337 F. 2d 902, 905; Lowe v. Manhattan Beach City School Dist. (1955, 9th Cir.), 222 F. 2d 258.

Ream in juxtaposition with the other cases cited, illustrates graphically that the issue which petitioners ask the Court to consider is a far-reaching and pressing one. It is ripe for decision. The present state of the federal law places before Federal District Courts, the first and principal battleground of kindred cases, a spectrum of rules ranging from vigorous Federal

judicial protection of the most ephemeral privileges of questionable social worth (e.g., the right to freely gamble in the Nevada casinos; Marshal v. Sawyer (1962, 9th Cir.), 301 F. 2d 639) all the way to decisions such as the one at bench holding that no federal jurisdiction exists to provide redress for anything short of physical seizure.

And, even beyond that, one finds suggestions such as in Ream, that no matter what outrage may have been perpetrated by overreaching state officials, the federal judiciary is impotent because the outrage was directed at "property rights".

In such an environment no one can tell with any degree of reliability whether or not the economically and emotionally costly task of litigating violations of constitutionally protected property rights should be undertaken in the federal courts. The most conscientious counsel in the face of the federal circuit court decisions discussed in the briefs herein, cannot effectively advise his clients. The process of judicial vindication of one's right to economic survival, has acquired attributes reminiscent of the spin of a roulette wheel.

II

RESPONDENTS' ARGUMENTS RE JURISDICTION RELY ENTIRELY ON SUPERSEDED AUTHORITY

Respondents' argument that federal jurisdiction stands or falls on the question of whether the complaint states a claim on which relief can be granted [1], relies on authorities which precede this Court's decision in Bell v. Hood (1946), 327 U.S. 678, which definitively rejected the kind of post hoc ergo propter hoc reasoning attempted by Respondents.

> "Jurisdiction, ... is not defeated as respondents seem to contend by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to

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1/ Respondents' bland assertions as to the obviousness of the jurisdictional question ring hollow when one bears in mind that throughout the District and Circuit Court proceedings, they never mentioned the subject. Indeed, Respondents concede (at p. 6 of Their Brief) that the grounds upon which the District Court dismissed the case went to the merits of the allegations of the amended complaint, and not to jurisdiction.

state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. * * * If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."

Bell v. Hood, supra, 327 U.S. at 682.

III

WHETHER OR NOT THE ACTS COMPLAINED OF CONSTITUTE A CAUSE OF ACTION UNDER STATE LAW, HAS NO BEARING ON FEDERAL JURISDICTION

Respondents' argument that their acts are "only" fraud and duress, subject to redress under state law, and against which the federal Constitution is impotent (p. 11, Respondents' Brief), brings to mind the words of Mr. Justice Rutledge in Screws v. United States (1945), 325 U.S. 91, 114:

"Strange as the argument is the reason. It comes to this, that abuse of state power creates immunity to federal power. Because what they did violated the state's laws, the nation cannot reach

their conduct. It may deprive the citizen of his liberty and his life. But whatever state officers may do in abuse of their official capacity can give this Government and its courts no concern. This, though the prime object of the Fourteenth Amendment and §20 was to secure these fundamental rights against wrongful denial by exercise of the power of the states.

"The defense is not pretty. Nor is it valid. By a long course of decision ... it has been rejected."

Also see Bell v. Hood, supra, 327 U.S. at 680-681.

CONCLUSION

It is difficult for one not to express sadness and anger at the sight of state officials who stand before the highest tribunal of the Nation and boldly assert that their acts of admitted "fraud and duress" are compatible with the constitutional concept of due process of law - "... a profound attitude of fairness ... particularly between the individual and government...."

Respondents fail to come to grips with the central, underlying issue of the case at bench: Do state officials possess the right to destroy human beings economically without offending the

Federal Constitution? And does it matter what technique is used when the acts in question are characterized by both sides as fraud and duress, and inflict massive damage?

When Petitioners were in the U. S. District Court seeking relief under the due process clause of the Fourteenth Amendment, they were told in so many words by that Court that the Fourteenth Amendment "never actually became effective as a matter of law" (R. Vol. 2, p. 32). As matters stand now, that distinctly ante bellum pronouncement of the District Court may as well be true. For the Petitioners there is no due process - there is only living with the shambles left by fraud and coercion committed under color of state authority.

Petitioners respectfully urge the Court that the Petition for Certiorari be granted.

Respectfully submitted,

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